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In the Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD P. CHRISTY, ET AL., PETITIONERS

v.

**MANUAL LUJAN, JR., SECRETARY OF THE INTERIOR AND
UNITED STATES DEPARTMENT OF THE INTERIOR**

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, is unconstitutional as applied to petitioners, who sought to kill grizzly bears that were attacking petitioners' livestock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-32a) is reported at 857 F.2d 1324. The memorandum and order of the district court (Pet. App. 2a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1988. A petition for rehearing was denied on November 3, 1988 (Pet. App. 33a). On December 1, 1988, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 3, 1989. The petition was filed on March 1, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

STATEMENT

1. Congress enacted the Endangered Species Act (the Act), 16 U.S.C. 1531 *et seq.*, "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species and threatened species" (16 U.S.C. 1531(b)). "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *TVA v. Hill*, 437 U.S. 153, 184 (1978). As the Court explained in *Hill*, "the language, history, and structure of the legislation * * * indicate[] beyond doubt that Congress intended endangered species to be afforded the highest of priorities" (*id.* at 174).

The Act authorizes the Secretary to designate particular species as "endangered" or "threatened" and to take measures to protect them. An "endangered" species is defined in pertinent part as "any species which is in danger of extinction" (16 U.S.C. 1532(6)), while a "threatened" species is defined in pertinent part as "any species which is likely to become an endangered species within the foreseeable future" (16 U.S.C. 1532(20)). The Act prohibits persons from "tak[ing]" any "endangered" species (16 U.S.C. 1538(a)(1)), where "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" (16 U.S.C. 1532(19)). The Act also authorizes the Secretary to issue "regulations as he deems necessary and advisable to provide for the conservation of [threatened] species," which may include regulations that flatly prohibit the taking of a threatened species (16 U.S.C. 1533(d)).

The grizzly bear (*Ursus arctos horribilis*) is listed as a threatened species throughout the lower 48 states (50 C.F.R. 17.11(h)), and since 1976 it has been the subject of

protective regulations (50 C.F.R. 17.40(b)). Those regulations generally prohibit the taking of grizzly bears, 50 C.F.R. 17.40(b)(1)(i)(A), with a few, limited exceptions. See Section 17.40(b)(1)(i)(B), (C), and (D). One of those exceptions, contained in Section 17.40(b)(1)(i)(C), describes the only circumstances under which grizzly bears preying on livestock may be taken. It provides in pertinent part:

Removal of nuisance bears. A grizzly bear constituting a demonstrable but non [*sic*] immediate threat to human safety, or committing significant depredations to lawfully present livestock, crops, or beehives may be taken, but only if:

(1) It has not been reasonably possible to eliminate such threat or depredation by live-capturing and releasing unharmed in a remote area the grizzly bear involved; and

(2) The taking is done in a humane manner by authorized Federal, State, or Tribal authorities, and in accordance with current interagency guidelines covering the taking of such nuisance bears * * *.

2. Petitioner Christy owned about 1700 head of sheep. On or about June 1, 1982, he began grazing the sheep on land he had leased from the Blackfeet Indian Tribe, located adjacent to Glacier National Park in Montana, which is a known habitat for grizzly bears. Beginning about July 1, grizzly bears began attacking the herd. After attempting, without success, to frighten the bears away from the herd, petitioner sought assistance from Kenneth Wheeler, an employee of the United States Fish and Wildlife Service, who tried to trap the bears. Pet. App. 10a; Gov't C.A. Br. 20.

By July 9, bears had killed about 20 sheep, worth at least \$1200. That evening, while petitioner Christy and Wheeler were standing together on the leased property, two grizzlies emerged from the forest. Christy picked up a rifle and shot and killed one of them. Pet. App. 10a.

On July 22, the Tribe agreed to terminate Christy's lease and to refund his money. Christy thereafter removed his sheep from the leased land, having lost a total of 84 sheep to the bears. Christy stated that he was thereafter forced to sell the remainder of his flock at slaughter value, absorbing a loss in excess of \$10,000. Pet. App. 3a, 10a-11a.

As a consequence of Christy's killing of the grizzly in violation of the Act and regulations, the Department of the Interior assessed a civil penalty against him of \$3,000. Christy thereafter filed an application for a hearing, seeking relief from the penalty. At the hearing, Christy admitted that he had killed a bear knowing it to be a grizzly, but he contended that he did so in the exercise of his right to defend his sheep. The administrative law judge sustained the imposition of the penalty but reduced it to \$2,500. Pet. App. 11a.

3. On January 30, 1986, Christy, joined by two other sheepherders, petitioners Guthrie and Perkins, filed the present action in the United States District Court for the District of Montana. In an unpublished memorandum and order, the district court granted summary judgment against petitioners (Pet. App. 2a-5a). The court first rejected the contention that there is a "fundamental right to possess and protect property" (*id.* at 3a). Applying, instead, the "rational basis" test, the court held that the Endangered Species Act is "rationally relate[d] to * * * the legitimate governmental concern of protecting threatened and endangered wildlife" (*id.* at 4a). The court next rejected the claim that the loss of petitioners' sheep constituted a taking of their property by the federal govern-

ment without just compensation, in violation of the Fifth Amendment (*ibid.*). The court also concluded that the Act constitutes a valid delegation of legislative authority and that the regulations "are a rational reflection of Congressional will, properly promulgated under the authority vested in the Secretary of the Interior" (*id.* 5a). Finally, the court sustained the penalty assessed against Christy, finding that it was supported by substantial evidence in the administrative record (*ibid.*).

4. The court of appeals affirmed (Pet. App. 6a-32a). The court first "decline[d] [petitioners'] invitation to construe the fifth amendment as guaranteeing the right to kill federally protected wildlife in defense of property" (*id.* at 18a). Instead, the court inquired whether the Endangered Species Act "rationally further[s] a legitimate governmental objective" (*id.* at 19a). Applying that standard, the court rejected petitioners' due process claim, holding that the Act and the accompanying regulations "plainly advance" the legitimate interest in "halt[ing] and revers[ing] the trend towards species extinction, whatever the cost" (*ibid.* (citation omitted)). For similar reasons, the court rejected petitioners' equal protection challenge to the Act (*id.* at 20a-25a). The court recognized (*id.* at 22a-23a) that the statute permits sportsmen a limited number of killings every year in certain parts of Montana. The court rejected, however, petitioners' "unsupported assumption that a program of carefully controlled killings of bears in limited geographic regions cannot promote 'conservation' and, therefore, necessarily conflicts with the purpose of the [Act]" (*id.* at 23a). Finally, relying on *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986), cert. denied, 480 U.S. 951 (1987), the court of appeals held (Pet. App. 26a-29a) that the statute and regulations do not constitute an unlawful taking under the Fifth Amendment. The court explained (*id.* at 28a) that "[t]he federal

government does not 'own' the wild animals it protects, nor does the government control the conduct of such animals." Accordingly, the court reasoned (*id.* at 29a), "[t]he losses sustained by [petitioners] are the incidental, and by no means inevitable, result of reasonable regulation in the public interest."¹

ARGUMENT

1. Petitioners contend that the Endangered Species Act and the regulations promulgated thereunder infringe their "constitutional right to protect property" (Pet. 10) and, therefore, violate due process and equal protection. They acknowledge, however, that "[t]he existence of a constitutional right to protect property has never been decided by this Court" (*ibid.*), and that the Constitution does not expressly recognize any such fundamental right (*ibid.*). Moreover, petitioners do not contest the court of appeals' observation (Pet. App. 16a) that "[n]o court * * * has construed the United States Constitution to protect" the right asserted. For the reasons stated by the court of appeals, this Court should decline petitioners' invitation "to expand the substantive reach" of the Due Process Clause of the Fifth Amendment (*Bowers v. Hardwick*, 478 U.S. 186, 195 (1986)).

Under the appropriate standard, the statute and regulations plainly are rationally related to a legitimate governmental purpose. Petitioners themselves acknowledge the statute's "commendable goal[]" (Pet. 13) of preserving

¹ The court of appeals also rejected the claim that the statute constitutes an undue delegation of legislative authority (Pet. App. 29a-31a), as well as the claim that the Secretary exceeded the scope of his authority in promulgating certain of the regulations (*id.* at 31a-32a). The petition does not present those issues.

endangered and threatened species of wildlife. Petitioners contend (Pet. 15), however, that they have been denied equal protection, because the regulations permit sportsmen to kill as many as 25 grizzly bears each year, in certain designated parts of Montana. See 50 C.F.R. 17.40(b)(1)(i)(E) (1987). As the court of appeals explained, however, the exception contained in that regulation was based on evidence establishing that " 'grizzly bear population pressures definitely exist in the [designated areas]' " (Pet. App. 24a), and that seasonal sport hunting—as opposed to the isolated killings urged by petitioners—"would both relieve the population pressures and condition the bears 'to avoid all areas where humans are encountered' " (*id.* at 25a (citation omitted)).

2. Petitioners also contend in passing (Pet. 16-17) that the Endangered Species Act and the accompanying regulations effect an uncompensated taking, in violation of the Fifth Amendment. The court of appeals, following the analysis of the Tenth Circuit in *Mountain States Legal Found. v. Hodel*, *supra*, correctly held otherwise. As the court below explained (Pet. App. 28a), the government does not own or control grizzly bears, although it tries to minimize their contact with humans. Moreover, the statute does not entirely bar efforts by landowners to protect their property from depredations by grizzly bears; it simply proscribes the killing of grizzlies, with narrow exceptions. Indeed, even the killing of "nuisance bears" is permitted as a last resort, provided that such killings are conducted by authorized state, tribal, or federal officials. See 50 C.F.R. 17.40(b)(1)(i)(C). The Act and the regulations are therefore like a great many other federal and state laws, including traditional fishing and hunting laws, that incidentally affect property rights and that have been upheld in the face of similar challenges. See, e.g., Bald and Golden Eagle Protection Act, 16 U.S.C. 668 *et seq.*;

Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*; Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*; Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1331 *et seq.*; *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986), cert. denied, 480 U.S. 951 (1987); *Bishop v. United States*, 126 F. Supp. 449, 452-453 (Ct. Cl. 1954), cert. denied, 349 U.S. 955 (1955) (crops lost to geese protected by Migratory Bird Treaty Act); *Sickman v. United States*, 184 F.2d 616 (7th Cir. 1950), cert. denied, 341 U.S. 939 (1951) (same).²

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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² What is more, the Endangered Species Act, as well as the regulations protecting grizzly bears in particular, had been in effect for several years before petitioner Christy began grazing sheep on land adjacent to Glacier National Park. Christy therefore has no basis for claiming a reasonable, investment-backed expectation of freedom from depredation by grizzly bears.